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No. 78-1429

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANTHONY COSTANZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 12a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1979. A petition for rehearing was denied on February 14, 1979 (Pet. App. 11a). The petition for a writ of certiorari was filed on March 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court erred in denying petitioner's motion for a new trial based upon the ground of allegedly newly discovered evidence.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiracy to possess stolen United States Treasury checks, knowing them to have been stolen from the mails, in violation of 18 U.S.C. 371 (Count I), and possession of the stolen checks, in violation of 18 U.S.C. 1708 (Count II). He was sentenced to two and a half years' imprisonment and a fine of $7,500 on Count I. Imposition of sentence was suspended on Count II and petitioner was placed on five years' probation. Following his convictions, petitioner moved for a new trial based on allegedly newly discovered evidence. After a hearing, the district court denied the motion (Pet. App. 8a-9a). The court of appeals affirmed by judgment order (Pet. App. 12a-13a).

1. The evidence at trial showed that sometime between April 15 and April 29, 1976, petitioner and Robert Stasio[1] met with Patrick Kelly, a government informant, for the purpose of soliciting Kelly's assistance in finding a buyer for United States Treasury checks that had been stolen from the mails (A. 154-155). Kelly was reluctant to handle the checks, so petitioner said that he and Stasio would try to sell the checks on their own (A. 155).

Petitioner was unable to find a buyer for the checks and, on April 30, he again met with Kelly. Following instructions given him by FBI agents, Kelly told petitioner that a possible buyer was Lenny Perrone, who worked at Mid-Atlantic Air-Sea Transport in Elizabeth, New Jersey (A. 158, 261). In fact, Mid-Atlantic was a sham trucking company operated jointly

[1]Stasio pleaded guilty to a related charged (A. 437-439). "A." refers to petitioner's appendix in the court of appeals.

by the FBI and the New Jersey State Police for the purpose of purchasing stolen property, and Perrone was an FBI agent, Leonard Pedreira (A. 43, 44).

That afternoon petitioner met Agent Pedreira at Mid-Atlantic and, in a conversation recorded by the agent, asked whether Pedreira would buy $3,000 worth of stolen Treasury checks for $1,500 (A. 58-63). In addition to showing Agent Pedreira the stolen Treasury checks, petitioner outlined his prior involvement with other stolen checks and credit cards. The agent asked petitioner to contact him again in a few days (A. 60-72).

Petitioner returned to Mid-Atlantic on May 3. Agent Pedreira then agreed to buy the checks and gave petitioner $1,500 in marked $50 bills (A. 99). The next day petitioner gave Kelly five of the $50 bills as payment for Kelly's efforts in procuring a buyer (A. 195, 255-256, 310).

2. Petitioner presented two defenses. First, he asserted that he was under the impression that the envelope he carried to Mid-Atlantic on April 30 contained a mortgage rather than stolen checks (A. 529). Petitioner explained that when he opened the envelope and discovered the checks he went through with the negotiations in order to gather information about Kelly's illegal activities, which he intended to report to the government (A. 539). In the alternative, petitioner argued to the jury that the government, through Kelly, entrapped him in retaliation for his failure as an informant.

The government's rebuttal evidence revealed that in March 1975 petitioner was indicted for failure to file a corporate tax return and was told that his personal tax returns were also under investigation. Hoping to obtain leniency on the tax charges, petitioner began providing information to FBI Agent Placide Jumonville and an Assistant United States Attorney concerning corruption in the banking industry (A. 859-861).

By the early spring of 1976, petitioner's cooperation had lessened. He refused to supply the government with documents and names necessary to prove his allegations that bank officials were accepting kickbacks in return for loans, he secretly recorded his meetings with government agents, and he engaged in illegal conduct without informing the government (A. 417, 863-867, 906, 922). Moreover, Agent Jumonville testified that he had not asked petitioner to supply information on Kelly and that on only one occasion had petitioner actually supplied information on Kelly (A. 269-270, 398-399).

3. After the jury had returned verdicts of guilty on both counts but before sentencing, petitioner moved for a new trial based on newly discovered evidence. The allegedly new evidence was a tape recording of a meeting between petitioner and Agent Jumonville on April 5, 1976. The tape recording was not presented at trial because, according to an affidavit supporting the new trial motion, petitioner had given the tape to the Federal Public Defender's office prior to trial but it could not be located until after the trial had been completed (A. 1150-1151).

Petitioner alleged that the tape showed that Agent Jumonville had given false testimony at trial when he testified that he had never asked petitioner to obtain information on Kelly. In the monitored conversation, petitioner does tell Agent Jumonville about Kelly's legal problems with regard to the Heritage Iron Bank in Morristown, New Jersey (A. 1168-1169). In addition, the agent is heard asking petitioner to find out more information regarding Kelly's relationship with a loan officer of a New York bank (A. 1185-1186).

After having his memory refreshed by the tape recording, Agent Jumonville filed an answering affidavit (A. 1239-1245). In general, the agent stated that he had not remembered this conversation because

the information petitioner had provided was not significant and because petitioner had never furnished any additional information regarding Kelly's involvement with the Heritage Iron Bank.[2] Furthermore, Agent Jumonville did not recall asking petitioner for additional information on Kelly because petitioner never supplied verification of the sketchy allegations that Kelly was paying off a loan officer at the New York bank (A. 1243).

The district court found that Agent Jumonville had suffered an understandable lapse of memory. It denied the motion for a new trial on the ground that petitioner's guilt "was so overwhelming that no production of this tape or no admissions by Jumonville with regard to it would have altered" the jury's verdict (Pet. App. 8a).

ARGUMENT

Petitioner contends (Pet. 7-14) that the district court erred in denying his new trial motion on the ground that the newly discovered evidence would not have affected the jury's verdict. This factual determination was affirmed by the court of appeals and does not warrant further review.

In his affidavit, Agent Jumonville admitted that his testimony at trial that he had not asked petitioner to obtain information on Kelly was incorrect. He stated, however, that he had forgotten the conversation because he deemed it insignificant. The district court credited this explanation and expressly found that the agent had not committed perjury (Pet. App. 8a). Accordingly, this case does not involve government misconduct in the knowing use of perjured testimony (compare *Napue* v. *Illinois*, 360 U.S. 264 (1959)) but

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[2]Agent Jumonville testified at trial that petitioner "may have" provided some information with respect to Kelly's relationship with the Heritage Iron Bank (A. 415).

rather concerns solely the post-trial recantation of testimony by a prosecution witness.

Generally, when a witness admits having given false testimony a new trial will be granted only if the court is reasonably well satisfied that (1) the witness was material and his testimony was false; (2) the jury might have reached a different conclusion were it not for the false testimony; and (3) the defense was surprised and unable to meet the false testimony or did not know of its falsity until after trial. *United States* v. *Wallace*, 528 F. 2d 863, 866 (4th Cir. 1976). See, *e.g.*, *United States* v. *Mackin*, 561 F. 2d 958, 961-962 (D.C. Cir.), cert. denied, 434 U.S. 959 (1977); *United States* v. *Coleman*, 460 F. 2d 1038, 1040 (8th Cir.), cert. denied, 409 U.S. 871 (1972). Admittedly, Agent Jumonville's trial testimony was inaccurate, but the district court found that the false testimony in no way affected the jury's verdict (A. 1290-1291, 1293-1294) and petitioner does not challenge that conclusion (Pet. 12). Petitioner, of course, was a participant in the conversation with Agent Jumonville, and he therefore could not have been unaware of the inaccurary of the agent's testimony during trial.[3] Nonetheless, petitioner never informed the court about the missing tape, nor did he seek a continuance to permit him to obtain the tape.

Petitioner argues, however, that the government's failure to disclose Agent Jumonville's request for information on Kelly requires that he be granted a new trial under either the Jencks Act (18 U.S.C. 3500) or this Court's decisions in *United States* v. *Agurs*, 427 U.S. 97 (1976), and *Giglio* v. *United States*, 405 U.S. 150 (1972). The Jencks Act is inapplicable since there was no written or recorded statement in the possession

[3]Petitioner's affidavits submitted in support of his new trial motion do not allege that he had forgotten the April 5 conversation prior to or during trial (A. 1152-1153).

of the government. By petitioner's own admission, he secretly recorded his conversation with the agent and gave the tape recording to the public defender. The Jencks Act does not require the government to memorialize the results of its interviews with informants.

Petitioner's reliance on *Agurs* and *Giglio* is similarly misplaced. He apparently contends that Agent Jumonville knew (although he temporarily forgot) about his conversation with petitioner regarding Kelly, that the agent's knowledge is attributable to the government, and that the prosecutor therefore violated his duty to disclose exculpatory evidence. But *Agurs* and *Giglio* are refinements of the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and, as the Court noted in *Agurs*, the *Brady* rule applies only to "the discovery, after trial, of information which had been known to the prosecution *but unknown to the defense*." 427 U.S. at 103 (emphasis supplied). As noted above, petitioner was obviously aware of the substance of his conversation with Agent Jumonville, so that, even assuming that the agent's prior knowledge of that event could be attributed to the government, the prosecutor's failure to disclose it during trial did not deprive petitioner of due process. See *United States* v. *Brown*, 582 F. 2d 197, 200 (2d Cir. 1978), cert. denied, No. 78-5352 (Oct. 16, 1978). Accordingly, there is no reason for the Court to consider petitioner's claim that the district court's application of the *Agurs* materiality requirement conflicts with decisions in other circuits.[4]

[4]Both in his statement of the questions presented for review (Pet. 2) and at one point in his argument (Pet. 11), petitioner alludes to the fact that the government obliterated a tape recording which allegedly demonstrated that petitioner had been promised leniency in return for his efforts as an informant. Petitioner makes no legal argument based on that claim, and the record clearly shows both that the tape was erased with petitioner's permission and that the government made no promises of leniency at the meeting in question (A. 864-868).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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